89-518

No. _____

Supreme Court, U.S.
FILED
AUG 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1989

PETER PILASKI,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 14, 1989

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44 pp

## QUESTIONS PRESENTED

1. Did the trial court's special *sua sponte* instruction improperly influence the jury to return a guilty verdict?

a. Was it improper to give the special charge before determining whether counsel would object to it?

2. Did the prosecutor's expression of personal opinion during the closing argument constitute prejudicial misconduct?

3. Was there insufficient evidence to support petitioner's conviction?

## LIST OF PARTIES

The parties to the proceeding below are Petitioner, PETER PILASKI, and the Respondent, UNITED STATES OF AMERICA.

Respondent before this Court is UNITED STATES OF AMERICA.

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No. _____

In The

# Supreme Court of the United States

October Term, 1989

PETER PILASKI,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Peter Pilaski, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 27, 1989. On July 26, 1989, the Ninth Circuit Court of Appeals voted to deny the petition for rehearing and rejected petitioner's request that the rehearing be held *en banc*.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not published and is reprinted in the appendix hereto, p. 1a, *infra*.

The Order of the Court of Appeals for the Ninth Circuit, denying petitioner's request for rehearing and request for rehearing *en banc*, was not published and is reprinted in the appendix hereto, p. 13a, *infra*.

## JURISDICTION

### A. Subject Matter Jurisdiction Of The District Court

The trial court's jurisdiction over the prosecution of petitioner was based upon a violation of United States law, Title 26, U.S.C. § 5861 and 18 U.S.C. § 844, and is conferred upon the District Court under Title 18, U.S.C. § 3231.

### B. Jurisdiction of the United States Court of Appeals For The Ninth Circuit

Judgments of convictions within the jurisdictional district are final decisions reviewable by the United States Court of Appeals for the Ninth Circuit pursuant to Title 28, U.S.C. §§ 1291 and 1294.

### C. Jurisdiction of the United States Supreme Court

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 27, 1989. Petitioner timely filed a petition for rehearing and suggestion for *en banc* consideration in the United States Court of Appeals for the Ninth Circuit on May 10, 1989. On July 26, 1989, the Ninth Circuit Court of Appeals denied the petition for rehearing and rejected a request that the rehearing to be held *en banc* on July 26, 1989. This petition for certiorari is filed within 60 days of July 26, 1989.

## STATEMENT OF THE CASE

A grand jury indicted petitioner with: (1) making and aiding and abetting in the making of a destructive device in violation of 26 U.S.C. § 5861(f)(1) (Count I); (2) possessing and aiding and abetting in the possession of an unregistered destructive device in violation of 26 U.S.C. § 5861(d) (Count II); (3) aiding and abetting in the destruction of government property and causing harm to individuals in violation of 18 U.S.C. § 844(f) (Count III); (4) conspiring to violate the aforementioned code sections in violation of 18 U.S.C. § 371 (Count IV); and (5) knowingly and willfully giving false statements to agents of the Federal Bureau of Investigation, in violation of 18 U.S.C. § 1001 (Count V). Petitioner entered a plea of not guilty to all five counts.

From November 30, 1987 through December 14, 1987, the matter came on for jury trial proceedings. Count V was dismissed on December 9, 1987. On December 15, 1987, the jury began its deliberations and did not return its guilty verdicts on all four counts until December 23, 1987.

On February 19, 1988, judgment on the four counts was entered and petitioner was sentenced to five years of custody as to Count I, five years of custody as to Count II, and fifteen years of custody as to Count III, concurrent with the sentence imposed on Counts I and II. In addition, petitioner was given five years probation on Count IV, to commence upon the completion of his prison sentence on the first three counts. Thereafter, petitioner's motion for bail pending appeal was then denied.

Petitioner then filed a timely notice of appeal and submitted the cause to the Ninth Circuit Court of Appeals. On April 27, 1989, the Ninth Circuit rendered its unpublished opinion affirming the judgment of the District Court. (See *infra*, p. 1a).

## STATEMENT OF FACTS

The charges against petitioner arose out of an explosion that occurred in November of 1986 at a General Services Administration ("GSA") office in San Francisco, California. At that time, petitioner's wife, Melanie Pilaski, was working at the office. The explosion was caused by a small bomb hidden in a bouquet of flowers delivered to Ms. Pilaski by Shaun Small. The explosion

caused minor burns and some injuries to Ms. Pilaski and a co-worker, Pam Castro.

Shaun Small lived with petitioner and Ms. Pilaski for a number of years. He was considered a surrogate son of the couple, and enjoyed all the benefits that the wealthy couple could provide.

Before the trial against petitioner started, Small had been convicted on several charges concerning the November bombing, and received a 15-year sentence. On the first day he was to testify against petitioner, Small refused, even with the court's threat of contempt, to take the oath as a witness. After a continuance of a number of days, over a weekend, Small returned to the stand and admitted that he delivered the bomb to the GSA office and to Ms. Pilaski's parents' home on November 17, 1986.

Distraught over the pending divorce between petitioner and Ms. Pilaski, Small set about to make a bomb which he delivered to Ms. Pilaski, while petitioner was visiting friends in Germany. Thereafter, he testified for the first time that he and petitioner made the bomb after petitioner had been served with the divorce papers.

Small had a history of violent actions, including physical assaults on Ms. Pilaski. Ms. Pilaski testified that Small struck her, and had thrown a bomb in a tenant's apartment.

Another witness recalled Small could be excited by nothing and "blow up" over the smallest things. Several people considered Small a very dangerous person. One tenant of the building Small managed testified that Small attempted to evict him by using rocks and explosive

devices. In fact, a note attached to one rock said, "Leave or die."

Fingerprint experts identified and examined all the evidence found at the residences, cars and lockers, and none of them showed petitioner's fingerprints on any explosive parts, or literature on explosives. On the other hand, Small's fingerprints appeared on many items, including several bomb components found at the apartment building. In short, the only evidence linking petitioner to the explosion was the testimony of Shaun Small.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### I. The Trial Court Improperly Influenced The Jury To Return A Guilty Verdict.

From November 30, through December 14, 1987, testimony and evidence was submitted to the jury for consideration. On December 15 the jury began its deliberations. Thereafter, the jury indicated to the court that it was having difficulty in agreeing on a verdict. The trial court, without consulting with counsel, gave an instruction to the jury intended to break the deadlock. The instruction was similar to that given in *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). Following the delivery of the instruction, the court stated:

> "I take it there was no objection to the instruction given. Petitioner's trial counsel, unable to ring the bell, made no objection."

Although an *Allen* type charge has been approved in some circuits, it has been disapproved in several other circuits (*United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973) (*en banc*); *United States v. Thomas*, 449 F.2d 1177, 1187 (D.C. Cir. 1971); *United States v. Flioravanti*, 412 F.2d 407, 420 (3rd Cir.) *cert. denied*, 396 U.S. 837, 90 S.Ct. 97, 24 L.Ed.2d 88 (1969)).

The danger of the *Allen* type charge is the possibility that the minority on the jury may be coerced into going along with the majority. A decision by a majority of jurors and imposed on the minority is not a unanimous verdict of each juror, but a decision of the majority of twelve. (See *United States v. Martin*, 765 F.2d 323, 326 (5th Cir. 1985); *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1969)). Thus, even in circuits where the *Allen* charge has been given general approval, courts have felt compelled to note that the charge should nevertheless be used with special care and caution not to influence the jury. (See *United States v. Mason*, 658 F.2d 1263, 1266 (9th Cir. 1981). Accordingly, instructions admonishing jurors to reconsider their position have been approved only when they are not coercive and if they serve to admonish the jurors to continue to consider the evidence. *United States v. Beattie*, 613 F.2d 762, 766 (9th Cir. 1980) *cert. denied*, 446 U.S. 982, 100 S.Ct. 2962, 64 L.Ed.2d 838 (1980).

Petitioner submits that the *Allen* charge given in the instant case was particularly coercive,[1] and should have been reviwed by counsel before given to the jury.

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[1] The Court instructed the jury as follows: "The Court: Good morning, ladies and gentlemen.

The Jurors: Good morning.

A Juror: It's not a very good morning.

The Court: You tell me that you're having difficulty agreeing upon a verdict.

You'll remember I told you in the original instructions that that was likely to occur, but it is extremely difficult to get 12 people to all agree on a proposition like that.

In many ways, while this case is a complicated case in some phases, both lawyers have agreed, I think, that the question of guilt or innocence really comes down to the question of whether you believe the witness Small or not.

The government has suggested that there is some corroboration that would indicate that what Mr. Small said was true. They've pointed out a variety of reasons why they think his testimony, were it false, would have been different, and Mr. Lyons argued very strenuously that you should accept that testimony.

On the other hand, the defense has argued to you that there are numerous inconsistencies in the testimony, and as I pointed out to you, there are various occurrences and conditions that have justified a caution to you that Mr. Small's testimony should be viewed with unusual caution and that you should look for corroborating circumstances.

It isn't a case where there are a whole series of disputed items. In my view and my view alone, it seems to come down to a question of whether Mr. Small is believable or not.

(Continued on following page)

In the instant case, the charge was given when the jury was evidently deadlocked a number of days after

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If you do believe him, his testimony, if believed, would, I suppose all parties would concede, be sufficient to justify a conviction.

But, on the other hand, the defendant is entitled to the reasonable doubt, and as I told you, a reasonable doubt is based upon an examination of the evidence and a determination in your mind that the evidence against the defendant is sufficient to convince you beyond a reasonable doubt of the guilt of the defendant.

The obligation of the government in a case like this is not to prove probabilities. In civil cases that you may have sat on, you decide whether something is more likely to be so than not. That's called judging facts by a preponderance of the evidence.

In criminal trials, the burden of the United States is much heavier and it must prove guilt beyond a reasonable doubt.

You'll remember I told you that if there are two reasonable explanations of the evidence and one reasonable explanation leads to the innocence and the other to guilt, you're obligated under the requirement of the reasonable doubt finding to accept the reasonable explanation that points to innocence.

You may well find that there is no reasonable evidence or interpretation that points to innocence but that is one of the considerations that you have to keep in mind.

The suggestion that I gave to you about counting noses and seeing how the evidence appears to other jurors I want to repeat to you:

If only one or two of you see doubts in the case and none of the remaining jurors seem to feel that the doubts are valid, you might want to reconsider whether the things that seem so important to you are truly important and whether they do

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justify having any doubts, realizing that the other jurors have heard the same evidence, are as well intentioned as you are, and give their views a careful consideration to see whether you should retain your views or not.

On the other hand, if you're nearly evenly divided, those of you who are convinced that there is no doubt in the case might reconsider your views. If a substantial number of jurors feel that there are doubts, you might very logically reconsider whether, if so many feel that there are doubts about the case, that you ought to persist in your views.

Now, none of this is to say that you are to give up any honestly-held views.

You've all heard the evidence. You're all entitled to your opinion on the case, and it's your own conscientious decision about the case that counts.

While it's important to both sides that this case be decided, if the defendant is guilty, he should know it, if the defendant is not guilty, he should at some early time leave here without the stain of this matter still over him.

But not all cases can be decided.

I can't imagine that it can be presented to a jury more able to resolve it than this jury. I can't imagine lawyers better able to present the case than the lawyers that we've had here, and it would seem to me that it is possible for you to come to a resolution of the case.

But as I say, none of you are to give up your conscientiously-held views solely for the purpose of arriving at a verdict, but I do suggest that you seriously consider and reconsider your views in an effort to reach an agreement, if you conscientiously can do so.

Now, let me ask: How many of you feel that further deliberations may be able to produce a verdict in the case?

(No jurors indicating)

(Continued on following page)

evidence had been submitted, and at a time very close to Christmas.[2]

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The Court: You feel that you're so hopelessly deadlocked that there's no conceivable way that you could come to an agreement?

(One juror raises hand)

The Court: Are you saying that that's your view?

You think there is a possibility that there might be a verdict. Anyone else feel that way?

A Juror: No. You referring to me?

The Court: Any other jurors feel that there is some possibility that the jury might reach a verdict with further deliberations?

(Two jurors raise hands)

The Court: I see that there are some of you.

I think it's been a long case and your deliberations really haven't been overly long for a case of this length and this importance.

I think it would be desirable for you to resume your deliberations now, particularly in the light of the suggestions I've made, and see if you can't come up with a verdict that expresses the conscientious views of all of you.

The jury will retire and reconsider its deliberations."

(RT, 1552-1556)

[2] Indeed, the court pulled the jury out of deliberations in order to make the comment about the pending Christmas holiday. "The Court: Well, ladies and gentlemen, you all look relatively healthy, not too exhausted.

I called you because I hadn't heard from you. I assume you're continuing with your deliberations, but I wanted to

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In its charge, the court made specific comments about its belief that the case boiled down to the question of whether the jury believed Shaun Small's testimony or not. In essence the court told the jury that it need only concentrate its efforts on Shaun Small's testimony. Without any specific guidelines given to the jury about how to evaluate Small's testimony, the court's submission of its belief about the case improperly influenced the jury to consider only Small's testimony. The court's belief as to the relative value of Small's testimony completely overshadowed other evidence introduced at trial indicating that petitioner had nothing to do with the crime. This

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suggest that you didn't commit yourself to putting in this many days just before Christmas, and I feel badly about your still being tied up.

I'm going to suggest, if you want to do it this way, that we recess now until Monday morning and that'll give you the opportunity to do whatever might be needed for your pre-Christmas preparations.

If you prefer to come back in tomorrow morning, that's fine with me, because I'll be here, but . . .

How many of you would prefer to put it over until Monday morning next?

(One juror raises hand)

The Court: How many would prefer to resume tomorrow morning?

(Jurors raise hands)

The Court: All right. Well, then, that will be – the majority will prevail and we'll have you back here, then, tomorrow morning at 10:00 o'clock." (RT, 1559-1560).

"belief" stacked the cards against petitioner in an unfair manner.

With regard to the period of deliberations following the *Allen* charge, it should be noted that within 38 minutes after receiving the instruction, the jury, following the court's belief, requested a copy of the transcript of Small's testimony. After reviewing the transcript, it returned a verdict of guilty. This short period of time after review of Small's testimony reflects the impact of the trial court's personal belief. In essence, the jury was led to believe that if it merely considered Small's testimony, in the abstract, and found it believable, it could justly convict petitioner. However, there was other evidence, such as the lack of fingerprints on the destructive device, that was probably not considered by the jury.

Given the relatively long deliberations and apparent lack of any confusion about the other jury instructions, it is not unreasonable to conclude that the deadlock was a consequence of the jury's inability to be persuaded by the prosecution's evidence. There was substantial evidence independent of Small's testimony that indicated petitioner's innocence. Thus, when the jury returned a guilty verdict relatively soon after it was told to concentrate on Small's testimony, it is not unreasonable to assume that the charge had a coercive effect on the jury. This is especially true when this court considers the fact that Christmas was within a few days, and the charge allowed the jury to pick an easy way out; just consider the testimony of Shaun Small and decide.

Petitioner is aware that the trial court may make such comment on the evidence, testimony and credibility of

any witness if it is necessary for the proper determination of the cause. *Quercia v. United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). However, the trial court's power to comment on the evidence is not without strict limitations because there is always a danger that judicial comment can replace a fair determination of factual issues with a legal opinion of the court. As this court stated in *Bollebach v. United States*, 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350, 354 (1946):

> "Influence of the trial judge on the jury is necessarily and improperly of great weight,' . . . the jurors are ever watchful of the words that fall from him. *Particularly in a criminal trial*, the judge's last word is apt to be the decisive word." (See also *Quercia v. United States, supra*, 289 U.S. at p. 470.) (Emphasis added.)

Thus, the constitutional provisions allowing the trial court to comment on the evidence do not authorize the judge to usurp the jury's exclusive function of determining the facts and judging the credibility of witnesses. As the court stated in *Minner v. United States*, 57 F.2d 506, 513 (10th Cir. 1932):

> "[The Court] . . . should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts."

The principle that the ultimate responsibility for determining the guilt or innocence of an accused remain with a jury is "so well established that its basis is not normally a matter of discussion." *United States v. Spock*,

416 F.2d 165, 180-181 (1st Cir. 1969). Thus, it is only in an *exceptional* case that a judge should express an opinion on the facts or the value of the testimony or the credibility of witnesses. Clearly, the court should not take upon itself to advise the jury as to how it should decide the case. *United States v. Womack*, 454 F.2d 1337 (5th Cir. 1972), *cert. denied*, 414 U.S. 1025, 94 S.Ct. 450, 38 L.Ed.2d 316; *United States v. Lowry*, 456 F.2d 341 (5th Cir. 1972); *United States v. Wood*, 458 F.2d 1351 (5th Cir. 1972).

As submitted above, the evidence clearly indicates that the court stepped into the impermissible territory of influencing the jury's ultimate verdict. No precautions were taken by the court to consider the ramifications of its charge. No opportunity was given to counsel to discuss the substance of the charge, to help frame the charge or to raise any objection to the charge before it was given. And, the court ultimately rendered its "belief" about what the case was all about. Under these circumstances, and given the pressures of the season, it is evident that the trial court's impromptu charge had a tremendous impact on the jury. The mistaken belief that a fair verdict could be made merely by reviewing Small's testimony probably led to petitioner's unjust conviction.

Given the conflict in the circuits concerning *Allen* charges, and the severity of the charges brought against petitioner, this Court should review this case to set the standard for *Allen* type charges, and determine whether an *Allen* charge should be given *sua sponte*, without consideration by counsel and an opportunity by counsel to object to the language of the charge.

**II. The Prosecutor's Expression of Personal Opinion Constituted Prejudicial Error.**

During the rebuttal portion of the prosecutor's closing argument, the prosecutor expressed a personal opinion as to the guilt of petitioner:

> "Mr. Lyons: Ladies and Gentlemen, Mr. Milano ended his speech to you rather dramatically by reading my own words to you. There are two problems, of course, with that.
>
> Number one is, you didn't hear any evidence about my closing argument at Shaun Small's trial, so he was reading to you something outside the record.
>
> Second, he didn't read you all of the closing argument.
>
> And since he's opened the door, let me mention something else that I said: I told the jury at that time that the evidence was consistent with three theories. One was that Shaun Small had done it by himself; one was that Peter Pilaski did it and Shaun Small didn't know what was in it; and the third was that Shaun Small and Peter Pilaski did it together.
>
> Now, of course, what we didn't have then, as we have now, is Shaun Small's own testimony about what actually had occurred, but I was as convinced then, before I had Shaun Small's statement, as I am convinced now that Peter Pilaski and Shaun Small did this together.
>
> What I argued –
>
> Mr. Milano: Excuse me, Your Honor –
>
> The Court: Yes, that's –

Mr. Milano: – but counsel certainly well knows that it is improper for him to express an opinion –

The Court: No lawyer ever tells the jury what the lawyer is convinced of. You may be convinced that the facts show certain things but that's as far as you ever go.

Mr. Lyons: That's very true.

The Court: It's quite clear you have no special knowledge of the case any more than Mr. Milano has.

Mr. Lyons: That's very true, and I ask the jury to ignore my comments about what I thought and *was* convinced of.

The fact is that the evidence was then basically what the evidence is now that's been presented to you, and that is it's consistent with Peter Pilaski and Shaun Small having conspired together and that is what was discussed with the jury then as well as has been discussed with you now." (RT, 10:1495-1496) (Emphasis added.)

It is well established that the prosecutor cannot assert personal knowledge of the guilt of an accused. In *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1934), this Court warned that "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused and they should properly carry none." In *United States v. Prantil*, 464 F.2d 548, 555 (9th Cir. 1985) the court determined that the prosecutor's " . . . closing arguments illustrate the degree of actual prejudice that results when an advocate, through his direct participation in the events under litigation, can argue to the jury based on actual or

perceived personal knowledge." (764 F.2d 556). The *Prantil* court went on to describe the personalized attacks on the defendant's motives.

In the instant case, the respondent, while admitting the error, argued that the comment was "inadvertent", and because there was no objection, the issue must be reviewed on the plain error standard of *United States v. Young*, 478 U.S. 1, 6-7 (1985). The record clearly indicates that petitioner's trial attorney did assert an objection to the comment but was cut off by the trial court when the objection was raised.

The Ninth Circuit found that the remark was improper, and did not address the meritless issue of whether petitioner made a timely objection. However, it failed to find that there was any harm to petitioner; the trial court had admonished the prosecutor, making it clear that it was something that the jury was not to consider, the prosecutor agreed with the court that the jury should ignore his comment, and, afterwards, the trial court did instruct the jury that comments of lawyers were not to be considered as evidence. Petitioner recognizes these events but submits that it is impossible to erase the impression that the prosecutor made. He participated in the previous action against Shaun Small, and at a very critical phase of the trial against petitioner, he improperly bolstered the testimony of the only witness who connected petitioner to the crime. When that kind of comment is made, in a situation where a single witness can convict an accused, *extra care and caution* should be taken to determine whether the comment is harmless. *United States v. McCoy*, 771 F.2d 1207, 1212 (9th Cir. 1985). Important to the *McCoy* court was whether the prosecutor's

behavior, "considering the context of the entire trial, including the conduct of the defense counsel, affected the jury's ability to judge the evidence fairly." *Id.*

Taking into account all of the circumstances of the case, petitioner submits that one cannot conclude that the prosecutor's improper remarks did not affect the jury's ability to judge the evidence fairly. While petitioner's attorney did object immediately, and the court did admonish the prosecutor, there was no specific curative instruction to the jury *at that time* or any comment by the court directly to the jury not to consider the specific comment of the prosecutor. Such immediate action was necessary in this case. Given the jury's difficulty in reaching a verdict, and the fact that it did not return a verdict of guilty until after it received a copy of Small's testimony, it is not clear if the prosecutor's remarks affirming Small's testimony, did not influence the jury. It is submitted that under the totality of the circumstances, the improper remark did affect the jury's ability to judge Small's testimony fairly; the prosecutor's unique position in prosecuting Small first, and then playing a major role in the conviction of petitioner probably weighed significantly in determining the truth of Small's testimony. And, it was clear that belief in Small's testimony was critical to a conviction of petitioner. Thus, the prejudice to petitioner was "so highly probable that this court is ' . . . not justified in assuming its nonexistence.'" *Berger v. United States*, 295 U.S. 78, 89, 55 S.Ct. 629, 633 L.Ed. 1314 (1934). Review should be granted to prohibit all future misconduct.

## III. There Is Insufficient Evidence To Support Appellant's Conviction.

In *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979), this Court rejected the previous "no evidence" rule of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) and held that "the critical inquiry on review of sufficiency of the evidence to support a criminal conviction . . . [is] to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.*, 443 U.S. at 318-319. Explaining the standard, the court stated that, "[t]his inquiry does not require a court to 'ask itself whether it believes that the evidence at trial establishes guilt beyond a reasonable doubt.' [Citations omitted.] As stated, the relevant question is whether, after reviewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, at 319.

At trial petitioner did not contest any of the evidence concerning the existence of bombs, the explosion, the destruction of governmental property or the injuries sustained by Ms. Pilaski and Ms. Castro. Indeed, petitioner did not contest any of Shaun Small's involvement in the bombing event. The basic question at trial was whether appellant shared responsibility with Small. Because other evidence clearly suggested that petitioner was not involved with the crime, the only evidence that linked petitioner to the crimes was Small's incredible story.

The credibility of witnesses and the weight accorded to the evidence are questions for the jury. *United States v.*

*Burns*, 701 F.2d 840, 842 (9th Cir.)(per curiam), *cert. denied*, 462 U.S. 1137, 103 S.Ct. 3123, 77 L.Ed.2d 1375 (1983). Further, petitioner recognized that uncorroborated testimony of an accomplice is sufficent to sustain a conviction *unless* the testimony is incredible or insubstantial on its face. *United States v. Whitten*, 706 F.2d 1000, 1007 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984).

The evidence submitted at trial clearly shows Small's testimony was incredible and unsubstantial on its face. First, Small exhibited bizarre behavior of repeated refusals to take the oath as a witness, despite the trial court's threat of contempt, and a peculiar proclivity to engage in violent acts, involving explosives, to rid people from his life. Further, Small's testimony was riddled with serious inconsistencies that would convince any reasonable person that Small was not stable and should not be relied upon. Indeed, FBI witnesses testified that he lied frequently about his involvement in the construction of the bombs. For example, on direct examination, Small testified that he poured powder into the pipes, but petitioner made both bombs. On the next day, during cross-examination, Small testified that he constructed the bombs by sawing up the pipes, putting the caps on, pouring powder and wiring it to the igniters. In another version, petitioner was merely present. Small also admitted that he misinformed the grand jury about what materials he purchased for the construction of the bombs and the use of pyrotechnical books. Thereafter, Small testified about a third version in which he and petitioner joined in all of the steps in making the bomb together. A fourth version occurred when petitioner's defense counsel

pointed out that Small's previous testimony was extremely inconsistent about the assembly of the bombs. All of these versions contradicted Small's testimony, given under oath, to the grand jury. Numerous other inconsistencies, such as participation in the crime and past acts clearly show that Small could not be believed by any reasonable person. Nonetheless, the jury returned a guilty verdict. Petitioner submits that under the circumstances of this case, no rational trier of fact could have found the essential elements necessary to convict petitioner, unless it relied upon the statements of the prosecutor concerning his personal opinion that petitioner was guilty, or concentrated on Small's testimony and it excluded other substantial evidence of petitioner's innocence. Thus, it is respectfully submitted that this Court should review this case to determine if petitioner's convictions should be reversed.

### IV. Appellant Was Denied Effective Assistance Of Counsel At Trial.

Petitioner submits in this argument he was denied effective assistance of counsel because his trial attorney: (1) failed to move the court for a competency hearing concerning the prosecution's star witness, Shaun Small; (2) failed to move the court for a psychiatric examination of Shaun Small; (3) failed to introduce critical evidence at trial; (4) failed to object to the court's "*Allen*" charge; (5) introduced damaging testimony concerning appellant's refusal to testify at Small's trial; and (6) failed to prevent the introduction of irrelevant inflammatory evidence.

To establish ineffective assistance of counsel, a criminal defendant must show: (1) that his trial counsel failed to exercise the skill, judgment, or diligence of a reasonably competent attorney; and (2) this failure resulted in prejudice to the defendant so that it was reasonably likely to alter the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984); *United States v. Vaccaro*, 816 F.2d 443, 455 (9th Cir. 1987). Petitioner submits that his trial attorney's performance was so inadequate as to deny him a fair trial, in violation of the Fifth and Sixth Amendments of the United States Constitution, for the aforementioned reasons (1) through (6).

## CONCLUSION

For all the foregoing reasons, a writ of certiorari should be issued to review the judgment and unpublished opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: September 14, 1989

Respectfully submitted,

BUSHNELL, CAPLAN & FIELDING

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*Peter Kurt Pilaski*

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA, | ) | No. 88-1087 |
| Plaintiff-Appellee, | ) | D.C. No. CR 87-0635-RHS |
| v. | ) | MEMORANDUM* |
| PETER PILASKI, | ) | (Filed Apr. 27, 1989) |
| Defendant-Appellant. | ) | |

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, District Judge, Presiding

Argued and Submitted December 13, 1988
San Francisco, California

Before: FLETCHER, BEEZER, and LEAVY, Circuit Judges.

FACTS AND PROCEEDINGS

On November 17, 1986, a small bomb, hidden in a flower bouquet, exploded on Ms. Pilaski's desk. Ms. Pilaski and a co-worker were injured by the explosion. Peter Pilaski and Shaun Small were charged with planting the bomb. The Grand Jury's indictment charged Peter Pilaski with (1) making, and aiding and abetting in the making of a destructive device in violation of 26 U.S.C.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

§ 5861(f) (Count I); (2) possessing, and aiding and abetting in the possession of an unregistered destructive device in violation of 26 U.S.C. § 5861(d) (Count II); (3) aiding and abetting in the destruction of government property and causing harm to individuals in violation of 18 U.S.C. § 844(f) (Count III); (4) conspiracy to violate the aforementioned code sections in violation of 18 U.S.C. § 371 (Count IV); and (5) knowingly and willfully giving false statements to agents of the Federal Bureau of Investigation (F.B.I.) in violation of 18 U.S.C. § 1001 (Count V).

Pilaski entered a not guilty plea to all five counts. On December 9, 1987, Count V was dismissed. The jury found Pilaski guilty on the other four counts. Pilaski was sentenced to fifteen years in prison. Pilaski appeals on seven grounds: (1) ineffective assistance of counsel; (2) error due to the prosecutor stating his personal opinion in closing argument; (3) jury instructions; (4) the *Allen* charge; (5) clear abuse by trial judge in allowing a continuance; (6) insufficiency of the evidence to support the conviction; and (7) illegality of his sentence. We affirm.

## DISCUSSION

### I. Assistance of Counsel

Pilaski claims he was denied effective assistance of counsel because his trial attorney: (1) failed to move the court for a competency hearing concerning Shaun Small; (2) failed to move the court for a psychiatric examination of Shaun Small; (3) failed to introduce critical evidence at trial; (4) failed to object to the court's *Allen* charge; (5) introduced damaging testimony concerning Pilaski's

refusal to testify at Small"s trial; and (6) failed to prevent the introduction of irrelevant inflammatory evidence.

*Standard of Review*

Ineffective assistance of counsel claims must be reviewed de novo by appellate courts. *United States v. Catabran*, 836 F.2d 453, 461 (9th Cir. 1988).

To prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) that his trial counsel failed to exercise the skill, judgment, or diligence of a reasonably competent attorney and (2) this failure resulted in prejudice to the defendant so that it was reasonably likely to alter the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Appellant must show that *but for* counsel's errors, the result would have been different. *Id.* at 694. The burden is upon the appellant to demonstrate that counsel's actions caused prejudice that more likely than not altered the outcome. Id. at 693.

A. *Competency Hearing*

Pilaski claims, given Small's history of bizarre behavior, that there was a legitimate doubt as to his ability to understand the proceedings and speak truthfully. Pilaski asserts that the trial counsel's failure to move the court for a competency hearing resulted in prejudice of a nature that was reasonably likely to have altered the outcome of his trial.

Fed. R. Evid. 601 states that: "every person is competent to be a witness except as otherwise provided in these

rules." Fed. R. Evid. 601 is meant to allow a broad spectrum of witnesses to testify, leaving credibility questions to the jury. We have held that a judge must hold a competency hearing if he reasonably should entertain a good faith doubt as to the defendant's competence. *Darrow v. Gunn*, 594 F.2d 767, 770-71 (9th Cir.), *cert. denied*, 444 U.S. 849 (1979). Pilaski presents no evidence showing why Small would have been declared incompetent to testify. Pilaski's attorney made the strategic choice of attempting to establish that Shaun Small had the motivation and capacity to commit the bombing on his own rather than to challenge Small's competency. Pilaski's attorney acted as competent counsel in not demanding a competency hearing of Small.

B. *Psychiatric Examination*

Pilaski claims that Small exhibited bizarre behavior which should have led Pilaski's attorney to ask for a psychiatric examination. Pilaski fails to note any case showing how counsel's failure to ask for a psychiatric examination of Small rose to the level of ineffective assistance of counsel. Even discrepancies in Small's testimony were credibility questions properly left to the jury. Although a psychiatric examination may have challenged Small's credibility, the jury was able to observe for itself Small's behavior and judge his credibility. Nothing indicates that Pilaski's attorney was not acting as a competent attorney.

C. *Telephone Records*

Pilaski cites, as another alleged deficiency in his representation, the fact that his attorney did not introduce certain telephone records. These telephone records supposedly that would have rebutted testimony of Shaun Small and his family that there was little contact between them after Small began living with the Pilaskis.

The evidence of the telephone records is collateral to any issue in the trial except credibility. On the issue of credibility, it is merely cumulative. Pilaski has failed to demonstrate that but for the failure to introduce the telephone records, the trial could have ended differently. The failure of Pilaski's attorney to introduce the telephone records does not constitute ineffective assistance of counsel.

D. *Allen Charge*

Pilaski cites as a deficiency in his representation the fact that his trial lawyer chose not to object to the *Allen* charge given to the jury during its deliberations. *Allen* charges are an acceptable practice in this circuit. *United States v. Wauneka*, 842 F.2d 1083, 1088-89 (9th Cir. 1988). As will be more fully discussed below, the *Allen* charge given by the court was not coercive. Therefore, Pilaski's attorney had no basis for objecting to an *Allen* charge.

E. *Refusal to Testify*

Pilaski asserts that his attorney introduced damaging evidence of Pilaski's refusal to testify at Small's trial and

that the introduction of this evidence constitutes ineffective assistance of counsel. Small testified that Pilaski was called to testify as a witness in Small's defense and that he asserted his constitutional right not to testify. Pilaski claims that this testimony allowed the government in redirect examination to ask additional questions in this area and develop the strong implication that Pilaski had something to hide.

Pilaski's attorney asked Small about Pilaski's refusal to testify at Small's trial in an attempt to discredit Small by showing how Small's testimony had changed between trials. Pilaski's attorney tried to show how Small, at his own trial, said Pilaski did all the bomb work, yet at Pilaski's trial indicated that he and Pilaski worked on the bomb together. Small was a crucial witness and this strategy is within the realm of competent lawyering.

F. *Introduction of Evidence*

Pilaski argues that he had ineffective assistance of counsel because his attorney did not object to evidence which was introduced by the prosecution that he beat his wife, that he was a member of a Hitler youth organization during World War II, and that his father was a high ranking officer in Hilter's Gestapo.

Evidence of Pilaski beating his wife could have been introduced to prove the intent or motive of Pilaski to kill or injure his wife. Fed. R. Evid. 404(b); *United States v. Bowman*, 720 F.2d 1103, 1105 (9th Cir. 1983). Thus, even if Pilaski's attorney had objected, the evidence was admissible.

Evidence that Pilaski was a member of the Hitler youth and his father a Gestapo officer was included in an answer by Ms. Pilaski about Pilaski's background. Any prejudice which might have occurred was cured by the trial court's instruction to the jury to disregard such evidence. There was other evidence quoting Pilaski to the effect that he was opposed to what Hitler had done.

*Conclusion*

Pilaski has failed to show any specific instances which individually or collectively constitute ineffective assistance of counsel. Pilaski has also failed to demonstrate any errors of counsel which had a reasonable likelihood of altering the outcome of his trial.

II. Prosecutor's Statement of Personal Opinion in Closing Argument

*Standard of Review*

Prosecutor's remarks are reviewed in "the entirety . . . under the harmless error rule, Fed. R. Crim. P. 52(a), to determine whether it is more probable than not that the improper remarks materially affected the verdict." *United States v. Prantil*, 764 F.2d 548, 556 (9th Cir. 1985); *see United States v. Lyman*, 592 F.2d 496, 499 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979).

Pilaski argues the prosecutor committed misconduct during his closing argument when he expressed a personal opinion as to the guilt of Pilaski. There is no dispute among the parties that the prosecutor made a

statement of personal opinion which was improper. However, defense counsel immediately interrupted and the trial court admonished the prosecutor, making it clear to the jury that this was not something it should consider. The prosecutor agreed with the court and asked the jury to ignore his comments about his personal conviction. The judge subsequently instructed the jury that what the lawyers said was not evidence in the case. The trial court's admonition of the prosecutor and instruction to the jury cured any possible prejudice to the defendant. The prosecutor's remark of personal conviction was harmless error.

III. Inconsistencies in Small's Testimony

*Standard of Review*

Pilaski claims that the judge committed error by telling the jury to focus on inconsistencies in Small's testimony. The question before reviewing courts is "whether the judge has made 'it clear to the jury that all matters of fact are submitted to their determination.' " *United States v. James*, 576 F.2d 223, 228 (9th Cir. 1978) (*citing Quercia v. United States*, 289 U.S. 466, 469 (1933)).

In *James*, we held that certain comments by the trial judge indicating that elements of the offense had been established did not impermissibly intrude upon the jury's function. *Id.* at 227-28. In this case, the judge merely focused the jury on the testimony of Small, which appeared to be key to this case. The judge commented to the jury that his opinion did not matter. Nothing in this case leads to the conclusion that the court misused its influence. Instead, the judge instructed the jury that his

comments were not to be taken as his view on the ultimate jury question of guilt or innocence, and that the jury was free to disregard them.

## IV. *Allen* Charge

*Standard of Review*

The standard of review for *Allen* charges is abuse of discretion. *United States v. Sommerstedt* 752 F.2d 1494, 1497 (9th Cir.), *cert. denied* 474 U.S. 851 (1985). "The test for impropriety of an *Allen* charge is whether, in its context, the instruction had a coercive effect." *Wauneka*, 842 F.2d at 1088.

Pilaski contends that giving the *Allen* charge was prejudicial error. "This circuit evaluates coerciveness on the basis of (1) the form of the instruction; (2) the period of deliberation following the *Allen* charge; (3) the total time of jury deliberations; and (4) the indicia of coerciveness or pressure upon the jury." *Id.* at 1088.

Pilaski claims that failure to use the language of the model instructions was error. No cases suggest that failure to follow the model results in error. In any event, the wording of the instruction was very close to the model and therefore the *Allen* charge meets part one of the five-part analysis in *Wauneka*. Similarly, the rest of the criteria as applied to the record fail to show coerciveness. The record reveals that six days separate the challenged jury instructions and the verdict. Three and one-half hours of deliberation has been considered sufficient. *United States v. Beattie*, 613 F.2d 762, 765 (9th Cir.), *cert. denied*, 446 U.S. 982 (1980). We cannot find a coercive effect.

V. Continuance for Small to Reconsider Taking the Oath

*Standard of Review*

"The decision to grant or deny a continuance lies within the sound discretion of the trial judge and will only be overturned upon a showing of clear abuse." *United States v. Clevenger*, 733 F.2d 1356, 1359 (9th Cir. 1984).

Pilaski contends that the trial court abused its discretion when the court permitted a continuance. When witness Shaun Small first took the stand, he unexpectedly balked at testifying by refusing to take the oath. The trial judge continued the trial over the weekend to allow Small an opportunity to consult with his lawyers and family. Small was essential to the government's case. No demonstrable prejudice accrued to Pilaski. The trial judge's rationale for a short continuance was sound and was not an abuse of discretion.

VI. Pilaski's Conviction

*Standard of Review*

"We review the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Jewell*, 827 F.2d 586, 588 (9th Cir. 1987).

Pilaski asserts that there was insufficient evidence to convict him. Pilaski is foreclosed from arguing this issue. As the Government properly points out, Pilaski waived his right to make this argument because he failed to raise this issue in a renewed motion for judgment of acquittal

at the end of the evidence or after the verdicts of guilty. *United States v. Harden*, 846 F.2d 1229, 1232 (9th Cir.), *cert. denied*, ___U.S.___, 109 S. Ct. 264 (1988).

However, even if this issue were not foreclosed, Pilaski's argument is meritless. In this circuit, we will reverse on the basis of insufficient evidence only if, viewing the evidence in the light most favorable to the Government, we determine that no rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *United States v. Martinez*, 806 F.2d 945, 946 (9th Cir. 1986), *cert. denied*, 481 U.S. 1056 (1987). The key issue in the trial was the credibility of the testimony of witness Shaun Small. If the jury believed Small, there was sufficient evidence to support Pilaski's convictions. The question of credibility is for the jury to decide. There was sufficient evidence to support Pilaski's convictions.

VII. Pilaski's Sentence

*Standard of Review*

Where the sentencing court imposes a sentence within the statutory limits of the prescribed crime, we will not disturb that decision unless we find an abuse of discretion. *United States v. Chiago*, 699 F.2d 1012, 1014 (9th Cir.), *cert. denied*, 464 U.S. 854 (1983).

Pilaski asserts that giving him the same sentence as Shaun Small received, in the face of significant differences in their culpability, constitutes an abuse of discretion requiring reversal on Count III. At the time of sentencing, the Government took the position that Pilaski was more culpable than Small because Pilaski directed

and planned the crime. The probation officer agreed in his presentence report. The trial court disagreed because Small had inserted a fragmentation device into the bomb on his own. The trial judge imposed the same sentence on Pilaski as Small had received, reasoning that Pilaski should not suffer a greater consequence from being involved in the bombing than Small. The trial judge's opinion concerning parity worked in favor of Pilaski and was not an abuse of discretion. The district court did not abuse its discretion in sentencing Pilaski to fifteen years imprisonment.

## CONCLUSION

Pilaski has failed to support a claim of ineffective assistance of counsel. The prosecutor's expression of personal opinion did not prejudice Pilaski. The trial court properly gave an *Allen* charge to the jury and focused the jury on the inconsistencies in Small's testimony. It was not an abuse of discretion for the judge to allow a continuance for Small to reconsider taking the oath. There is sufficient evidence to sustain Pilaski's convictions on all counts. The district court's sentence was not an abuse of discretion. The judgment of the trial court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA, | ) | No. 88-1087 |
| Plaintiff-Appellee, | ) | D.C. No. CR 87-0635-RHS |
| v. | ) | ORDER |
| PETER PILASKI, | ) | (Filed Jul 26 1989) |
| Defendant-Appellant. | ) | |

Before: FLETCHER, BEEZER, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.